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No. 88-1600

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

HOLY SPIRIT ASSOCIATION FOR THE UNIFICATION OF WORLD CHRISTIANITY AND NEW EDUCATION DEVELOPMENT SYSTEMS, INC.,
Petitioners,

v.

DAVID MOLKO AND TRACY LEAL,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of the State of California

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REPLY BRIEF OF PETITIONERS

JEFFREY S. ROSS
FRIEDMAN, SLOAN
& ROSS, P.C.
1 Maritime Plaza
San Francisco, CA 94111
(415) 788-2200

LAWRENCE A. GIBBS
671 Vincente Street
Berkeley, CA 94707
(415) 528-1078

REX E. LEE *
CARTER G. PHILLIPS
MARK D. HOPSON
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 429-1000

Counsel for Petitioners

* Counsel of Record

May 10, 1989

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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Respondents cannot seriously dispute that the decision below resolves an issue of fundamental importance to the religious community in a way that is inconsistent with prior decisions of this Court and with the decisions of several lower state and federal courts. Rather than addressing the question presented, respondents have provided this Court with a preview of their closing argument to the jury, invoking the memory of Charles Manson, Jonestown (Leal Opp. 11), and "Chinese Communist" labor camps. Molko Opp. 6-7. The respondents' Briefs in Opposition make clear one central point: this is not a case about "fraud" or any other common law tort. Instead, as respondents' arguments clearly illustrate, this case involves a direct attack on a process of reli-

gious conversion or change of belief, which respondents have now conceded involved no force, threats of force or other tortious conduct. Molko Opp. 6 (challenged conduct "does not include the use of force [or] threat of force"). Regardless of the terminology used to describe the facts at issue, respondents' claims—as sanctioned by the court below—essentially give rise to a new tort, useful primarily to attack minority religions and their beliefs but with extremely broad implications for common law and First Amendment doctrines. As such, the holding below warrants review by this Court.

1. Respondents concede that the decision below "does burden the free exercise of the Unification Church's religion." Molko Opp. 16. See Leal Opp. 8. In fact, the potential liability of petitioners in this case is based *entirely* on protected religious conduct and belief, *i.e.*, proselyting and religious conversion. Pet. 16-17.[1] See Molko Opp. 7-8; Leal Opp. 1. Respondents nevertheless attempt to belittle this burden by suggesting that the decision below will affect only the Unification Church. Of course, that infringement alone would raise a significant First Amendment issue. However, what makes the issue particularly worthy of the Court's attention is the substantial burden that the decision below places on all religious proselyting. The extent of that burden was succinctly stated by the *Amici* Brief of the National Council of Churches of Christ and other religious groups:

> the ruling below creates a *new* tort of "coercive persuasion" pursuant to which liability can be imposed on a church solely on the basis of a court's subjec-

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[1] Respondents concede that they will be seeking to recover damages, *inter alia*, for being "induced to join the Unification Church . . . ." Leal Opp. 6 n.3. Contrary to respondents' simplistic assertions, however, there is no way for a jury or other factfinder to isolate church beliefs from church practices in the context of a religious conversion or induction into any religious organization. Pet. 21-22; Brief *Amici Curiae* of NCC, at 14-15.

> tive determination of the propriety of religious messages. The ruling below does not narrowly proscribe deceit; it subjects *all proselyting by all churches* to regulation and involves the courts in examining the validity of religious conversions.

Brief of the National Council of Churches of Christ in the U.S.A. ("NCC"), *et al.*, as *Amici Curiae* in Support of Petitioners, at 7 (emphasis added).

The substantial impact of this new tort doctrine on both mainstream and minority religious organizations cannot be avoided by the simplistic edict "don't commit fraud." A disgruntled former member of any church can, according to the California Supreme Court, readily put the church to the burden of trial simply by *alleging* that some member of the church either misstated *or* failed to disclose some material fact about the church's teachings, leadership or doctrines. Under the decision below, any allegation of material misrepresentation or nondisclosure is sufficient to subject the church's beliefs and conduct to searching courtroom inquiry to determine if "coercive persuasion" occurred, thereby providing virtually every apostate church member with a ticket for admission to court.[2]

2. The validity of this undisputed burden on the free exercise and free speech rights of religious groups turns

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[2] The impact of the decision below on established religious belief and practice is starkly illustrated by the treatment of Molko's claim for restitution of a donation he made months after he joined the Church. Although Molko admits that he made the donation with the sincere belief that he should "give [this] money to God" (and there is no allegation of fraud in the circumstances surrounding the donation), the decision permits an award of restitution based on the allegation of "brainwashing" in Molko's earliest contacts with the Church. Under such a doctrine, any donation to any church is subject to revocation based not on fraud or any other recognized tort—or even on the circumstances of the gift—but on the theory that the disgruntled member's contacts with the church were psychologically "coercive."

entirely on the state's interest in preventing exposure to "coercive persuasion" or "brainwashing." See Pet. 17-18. "Despite the psychological label, 'coercive persuasion' is merely a euphemism for 'speech' and related religious activity." Pet. 18; see Pet. 18-19, 22-26. The *Amici* Brief filed by the Society for the Scientific Study of Religion ("SSSR"), *et al.* states that the pseudo-scientific theory of "brainwashing" reflects nothing more than a "negative value judgment about the beliefs and practices of the Unification Church." Brief *Amici Curiae* of SSSR, at 19. The SSSR *Amici* conclude that

> the allegation of "coercive persuasion" at issue in this case has no scientific validity and has not been accepted by the relevant professional and scientific communities. It thus provides no basis for subjecting religious organizations to tort liability for conversion practices.

Brief *Amici Curiae* of SSSR, at 4.

Assuming *arguendo* that it could be proven, as a matter of "psychological theory," that individual religious beliefs could be more readily changed by certain types of particularly persuasive speech, the state interest in protecting citizens from "overly persuasive" speech does not provide a compelling interest that justifies a jury inquiry into the legitimacy of petitioners' proselyting and respondents' religious conversion. Pet. 16-19; *cf. NAACP* v. *Claiborne Hardware Co.*, 458 U.S. 886 (1982). Yet, this is just what the court below held, *viz.*, that the State of California has a compelling interest in preventing individuals from being persuaded (by non-threatening speech) to convert to a new religion. This incredible intrusion into the free exercise of religion warrants review by this Court.[3]

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[3] The compelling state interest analysis below is disturbing for two additional reasons. First, the court's conclusion that there is a compelling state interest implicated here is based on no valid

3. The petition is not, as respondents suggest, a plea for "immunity" from tort liability. Petitioners always have conceded that respondents should be permitted to recover for any common law tort committed by petitioners, including fraud. See Pet. 13 n.18.[4] However, damages for fraud or other tortious conduct should be applied to petitioners consistent with common law standards. *Id.* What the court below permits—and what petitioners and their *amici* ask this Court to review—is the respondents' *expansion* of existing tort law to recover damages that "proximately result" from being "induced" to change their religious beliefs and "join the Unification Church." Molko Complaint, ¶ 15; see Pet. 13-14. Those damages *are not based on fraud or any other common law tort.* See Pet. 12-16, n.18, n.19.[5] Rather, the

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scientific evidence. There is no evidence that "brainwashing," as described by respondents, is possible outside of a setting of captivity. *See* Brief *Amici Curiae* of SSSR, at 7-20. In the absence of any evidence or support for the asserted state interest, such an interest surely cannot be deemed "compelling" in light of the core First Amendment activities at stake. Second, no state legislature has ever enacted legislation condemning either the type of proselyting efforts at issue or, more generally, the conduct labelled "coercive persuasion" or "brainwashing." Thus, the political branch of government has not found that any interest exists to warrant even attempting to regulate petitioners' so-called "illegal" (Molko Opp. 3) "coercive practices." While the absence of state legislation may not be a per se basis for holding that there is no compelling state interest involved here, it is a strong indication that casts serious doubt on the judgment of the California Supreme Court.

[4] The existence of "fraud" is, of course, *assumed* for purposes of this petition. *See* Pet. 5 n.5. Statements by respondents that petitioners have "admitted" to fraud or other tortious conduct (Molko Opp. 3, 5 n.4) constitute a flat misrepresentation of the record.

[5] It is undisputed that the only fraudulent misstatement or omission alleged by respondents was the failure to disclose petitioners' identity as "Moonies." *Cf.* Matthew 26:69-75. This alleged misrepresentation (or failure to provide a sectarian "Miranda warning") was cured by the time that respondents' conversion (and their alleged "damages") occurred. *See* Molko Pet. 10. (Respondents

right to recover such damages depends entirely on acceptance of the respondents' "brainwashing" theory as a basis of Church liability. Pet. 14 n.19. Both respondents essentially concede as much. Leal Opp. 6; Molko Opp. 12-13.

Putting aside allegations of "brainwashing," respondents also have conceded that they were not "harmed" in the course of their conversion. See Molko Opp. 6; Leal Opp. 1. Respondents were *never* physically restrained, threatened, held captive, or deprived in any way, except in the course of departure from the Church (*i.e.*, their abduction and "deprogramming").[6] Thus respondents' statements that this is a routine tort case are entirely hollow. This is a novel, but unfortunately not unprecedented, form of tort action—it is a lawsuit, sanctioned by the California Supreme Court, in which former members of a religion will challenge the validity of their religious conversion and seek damages for that conversion. See Brief *Amici Curiae* of NCC, at 7-9.

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never have contested that they were fully informed of the identity of petitioners at the time they joined the Church. Pet. 4-5. Nevertheless, if the decision below is not reversed, petitioners will be entitled to—and intend to—seek damages arising from their religious conversion. Pet. 11-12; Leal Opp. 6 & n.3.

[6] In this regard, it is significant that respondents rely on the fact that "brainwashing" is mentioned in the psychological diagnostic manual to prove that such a phenomenon exists. That manual refers to "brainwashing, thought reform, and indoctrination while the *captive* of terrorists or cultists." Leal Opp. 10 (emphasis added). But, any suggestion that respondents were "captives" is ludicrous; as the court below noted, both respondents were "free to depart at any time" and one respondent "commuted to a bar review course" during the period in question. *See* Pet. 7 n.8. Thus, repeated allusions to Chinese Communist labor camps and "prisoners of war" (*see* Molko Opp. 6-7) are equally inapposite and, at bottom, ridiculous. With respect to the degree of psychological pressure and "coerciveness," respondents were no more captives—and, in a sense, they were less "captive"—than the average first year law student. *See* Pet. 22 n.25; 24-25 n.33.

4. At bottom, it is clear that the respondents' theory of non-violent—even "voluntary"— brainwashing lies at the heart of this case. Respondent Molko even asserts, without citation, that "brainwashing" itself is both actionable and "illegal." Molko Opp. 3. Putting aside all issues as to the fraud claim, both respondents also claim that they should recover damages (under the rubric for intentional infliction of emotional distress) based *solely* on the conduct that they have characterized as "brainwashing." Molko Opp. 11; Leal Opp. 2.

Thus, the only basis for allowing respondents to go forward to trial on their claims rests on acceptance of their argument that non-violent and non-threatening religious proselyting can be held to be wrongful conduct—"brainwashing"— that gives rise to damages in the context of a religious conversion. See Pet. 10-12, 14-15. In this regard, it is noteworthy that, even at this late date, respondents cannot agree on a definition of what constitutes "brainwashing." According to respondent Molko, it consists of such "nefarious techniques" (Molko Opp. 7) as (1) inducing "emotional arousal"; (2) "immers[ing]" persons in a "social milieu" that "consistently and uniformly" represents a certain viewpoint; and (3) engaging in "interrogation" that includes "self-criticism," "rote learning" and "group discussion." Molko Opp. 6-7. Respondent Leal focuses on (1) "deprivation" of "outside information"; (2) "preventing" "opportunity to reflect"; (3) "concocted struggle and confession"; and (4) "discouraging any questioning by the recruit." Leal Opp. 1. It is difficult to imagine a more direct affront to religious liberty than to subject a church to a trial of its beliefs and practices on such vague and ill-defined criteria. See Pet. 22-26; *cf.* Pet. App. 137-151 (various statements of "brainwashing" theory by respondents' experts).

Ultimately, the one issue on which both petitioners and respondents agree (Pet. 21-23; Leal Opp. 8-10;

Molko Opp. 21-23) is that theories of liability based on religious "brainwashing" have been accepted in some courts and rejected in others. Thus, there is no question that this case presents a conflict on an important and recurring constitutional question that involves a significant threat to religious liberty—not only to minority or controversial religious groups, but to every religion that engages in proselyting and conversion.[7] See Brief *Amici Curiae* of NCC. This Court should grant the petition and resolve the conflict among the lower courts concerning the proper balance to be struck between the protection of religious proselyting and conversion and the state's interest, if any, in protecting its citizens from psychologically "coercive" speech.

CONCLUSION

For the foregoing reasons and those presented in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

JEFFREY S. ROSS
FRIEDMAN, SLOAN
& ROSS, P.C.
1 Maritime Plaza
San Francisco, CA 94111
(415) 788-2200

LAWRENCE A. GIBBS
671 Vincente Street
Berkeley, CA 94707
(415) 528-1078

REX E. LEE *
CARTER G. PHILLIPS
MARK D. HOPSON
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 429-1000

Counsel for Petitioners

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* Counsel of Record

[7] Moreover, respondents have not challenged the court of appeal's conclusion that the "facts regarding the occurrences giving rise to this lawsuit are essentially undisputed." Pet. 7 n.10.